SERVED: March 12, 2004

NTSB Order No. EA-5083

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of March, 2004

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. JAMES ALLEN LePARD, Respondent.	Docket SE-16657

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on January 8, 2003, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, finding that respondent had violated 14 C.F.R. 91.119(c) and 91.13(a) of the Federal

[1] The initial decision, an excerpt from the transcript, is attached.

Aviation Regulations ("FAR," 14 C.F.R. Part 91).[2] We deny the appeal.

The Administrator's complaint stems from a dispute that pitted respondent and his aircraft against snowmobilers. On December 8, 2001, respondent overflew a snow-covered airstrip, parts of which were being used by snowmobilers. Respondent admitted to having flown below 500 feet, but claimed that doing so was necessary for landing.[3] The law judge disagreed that a landing was intended.[4] During the course of the hearing the law judge made two procedural rulings that are the subject of respondent's appeal. We address each below.

1. *Did the law judge err in denying respondent's request for a continuance of the hearing date?* In addition to this proceeding, at the time of the hearing there were two actions

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[2] Section 91.119(c) provides that, except when necessary for takeoff or landing, no person may operate an aircraft over other than congested areas at an altitude less than 500 feet from the surface. In sparsely populated areas, operations must be more than 500 feet from any person, vessel, vehicle, or structure. Section 91.13(a) prohibits careless or reckless conduct that potentially endangers the life or property of another. Respondent in this case was charged with recklessness.

[3] The law judge found as a matter of fact that respondent flew within a few feet of snowmobilers and dangerously close to the ground and to the trees on the margins of the strip. The general perception of the eyewitnesses was that respondent was trying to scare the snowmobilers, and was "smirking" as he flew by.

[4] He specifically found that respondent made three low passes over the airstrip, one being typical and two being more than enough to decide whether to land, and that by the third pass there was no one on the runway to impede a landing. He also found that the snow was too deep for respondent's aircraft to land safely, equipped as it was with tires (as compared to skis).

pending against respondent regarding the events of December 8, 2001 – a civil action and a criminal action. Respondent contends that the law judge should have granted his request to postpone the hearing for 6-7 months, at which time he expected the criminal trial would be completed and respondent would be free to testify on his own behalf without fear of his testimony being used against him in the criminal case. The law judge denied the motion, and we agree.

Complainant's reply brief on this issue is thorough and compelling. Our precedent is clear, the law judge properly applied it, and respondent offers no convincing reason to depart from it. We are not bound by Keating v. Office of Thrift Supervision, 45 F.3d 322 (9th Cir. 1995), or the other cases cited by respondent, nor do they even directly apply to administrative proceedings. In any case, as complainant notes, the law judge performed the same type of balancing as Keating suggests. The delay respondent sought, even if only as long as originally proposed,[5] would adversely affect aviation safety (respondent was charged with reckless conduct) and further erode witnesses' memory. Respondent has a choice whether to testify in his own defense or not; that choice does not grant him the right to control this proceeding to ensure that he can exercise the choices in the way most favorable to him.

[5] Respondent does not, even now, indicate whether the criminal case has been finally resolved.

2. *Did the law judge err in refusing to allow testimony from the Idaho Division of Aeronautics?* Respondent sought to introduce telephone testimony of Mark Young, Manager of the Idaho Division of Aeronautics, which manages the airstrip on behalf of the state. The testimony was intended to show that the snowmobilers had only limited authorized access to the airstrip. The law judge so found, but he also found that it did not matter if the snowmobilers had *no* authorized access to the airstrip; that would not have entitled respondent to "buzz" them.[6] Respondent's proffer does not support his contention that his three low passes were legitimate attempts to land, and we do not see what else it might add to his defense.

The question before the law judge was whether respondent's three low passes were excused on the grounds they were in connection with landing. The law judge found they were not, having heard evidence that one pass would have been enough to determine the safety of a landing, and that, in any event, a reasonable pilot would not have needed to make the pass so low as did respondent to determine whether it was safe to land. We see no error in the law judge's rulings.

[6] As the law judge noted, "[I]f you're illegally standing in the middle of the street, you may be subject to arrest and a fine for improperly crossing the highway, [but] that doesn't mean that you can be run down." Tr. at 179.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 180-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.[7]

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and GOGLIA, CARMODY, and HEALING, Members of the Board, concurred in the above opinion and order.

[7] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).